Supreme Court of the United States

OCTOBER TERM, 1945

No. 213

F. G. BADENHAUSEN, WILLIAM S. SPATCHER and HOWARD H. HUBBARD, constituting the Protective Committee for the Holders of Georgia and Alabama Railway First Mortgage Consolidated Five Per Cent. Gold Bonds,

Petitioners and Appellants Below,

against

OTIS A. GLAZEBROOK, JR., JOSEPH FRANCE and CHARLES MARKELL, as the Reorganization Committee of the Seaboard Air Line Railway Company, et al.,

Respondents and Appellees Below.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Opinions Below

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 148 Fed. (2d) at page 450. It is printed at R. Vol. I, pages 637 to 639. The Decree of the District Court of the United States for the Southern District of Florida (hereinafter called the Florida Court), which was affirmed by the Circuit Court of Appeals for the Fifth Circuit, is printed in the record at Vol. I, pages 15 and 16.

That Decree of the Florida Court confirmed a Decree of the District Court of the United States for the Eastern District of Virginia (the court of primary jurisdiction in the Seaboard receivership proceedings, which is hereinafter called the Virginia Court). The Virginia Court's decree is printed in the record at Vol. I, pages 1 to 14.

The opinion of the Virginia Court is printed in the record at Vol. I, pages 81 to 145, and reported as *Guaranty Trust Co. of New York, et al.* v. *Seaboard Air Line Ry. Co. et al.*, in 53 Fed. Supp. 672.

Jurisdiction

Petitioners invoke the jurisdiction of this Court under Section 240 (a) of the Judicial Code (28 U. S. C., Section 347).

Brief Statement of Facts

Proceedings in equity looking toward the reorganization of Seaboard Air Line Railway Company (hereinafter called Seaboard) were instituted in December, 1930, in the Virginia Court. At the same time ancillary proceedings were instituted in the Florida Court.

In 1943 the Virginia Court entered a Decree (R. Vol. I, page 1), dated December 10, 1943, approving a plan of reorganization of Seaboard. The Florida Court entered a Decree dated December 14, 1943, adopting and confirming the Decree of the Virginia Court (R. Vol. I, page 15). Those Decrees are hereinafter called the Virginia Decree and the Florida Decree, respectively.

These petitioners appealed severally from the Virginia Decree and the Florida Decree, which confirmed the Virginia Decree, raising identical issues on each of the appeals.

The two appeals involved substantially the same parties. The appeal from the Virginia Decree was argued before the Circuit Court of Appeals for the Fourth Circuit in June, 1944. That Court affirmed the Virginia Decree in *Badenhausen et al.*, v. *Guaranty Trust Company of New York, et al.*, 145 Fed. (2d) 40 (1944).

Thereupon these petitioners applied for certiorari to the Circuit Court of Appeals for the Fourth Circuit, raising in substance, the same questions which they seek to raise in their pending petition. That petition was docketed as "*Badenhausen et al.* v. *Guaranty Trust Company of New York, et al.*, No. 720, October Term, 1944" and is hereinafter referred to as Case No. 720. This Court denied that petition on January 8, 1945. *Badenhausen et al.*, v. *Guaranty Trust Co. et al.*, 323 U. S. 797.

Petitioners' appeal from the Florida Decree confirming the Virginia Decree was argued before the Circuit Court of Appeals for the Fifth Circuit early in 1945, and on April 10, 1945, the Circuit Court of Appeals for the Fifth Circuit handed down its opinion affirming the Florida Decree (R. Vol. I, page 637; *Badenhausen et al.*, v. *Glazebrook, et al.*, 148 Fed. (2d) 450). It is on that opinion that the pending petition for certiorari is based.

The Circuit Court of Appeals for the Fifth Circuit did not consider any of the questions presented by the appellants (the petitioners herein) relating to the merits of the Reorganization Plan. That Court affirmed the Florida Decree on the ground of comity, saying:

> "The questions all relate to the equitable sharing among all the lienholders of the new securities proposed to be issued, and are such that any court having the parties before it might decide. They are questions pertaining to the general policy and dis-

> position of the receivership, most proper to be decided by the court having the primary receivership. They have been there decided carefully and fully. Ancillary receiverships are generally conducted in harmony with the court having original jurisdiction of the primary receivership, and the Federal Court of the Southern District of Florida, and this Court on appeal, out of comity and in the interest of efficient handling of the receivership property as a whole or as a unit, should follow the decision thus made, unless we should find that there was oversight or clear disregard of the rights of local creditors in the property subject to the ancillary receivership. This we do not find and there was no reversible error in the lower Court in following the decision of the Fourth Circuit in the reorganization proceedings. * * *"

It is, therefore, apparent that none of the questions which petitioners seek to have this Court review was actually decided by the Circuit Court for the Fifth Circuit. If this Court should review the decision of the Fifth Circuit Court of Appeals, the only question to be considered could be whether that Court properly applied the doctrine of comity or had a duty to reexamine the questions relating to the fairness of the Reorganization Plan which had already been passed on by the Fourth Circuit Court of Appeals, with certiorari denied by this Court. *That question is not even raised by the petitioners. It is clear, therefore, that the petition presents no basis for the issuance of a writ of certiorari.*

Petitioners are really asking this Court to reconsider its refusal to grant certiorari to the Fourth Circuit Court of Appeals in Case No. 720. That attempt is consistent with their whole policy of seeking to relitigate, in Court after

Court, the same questions which were painstakingly considered and decided against them by the Virginia Court and the Florida Court and by the Fourth Circuit Court of Appeals.

This is the third petition for a writ of certiorari which has been filed by these petitioners in connection with the Seaboard reorganization. The first petition was in Case No. 720. The second petition was in a case known as *Badenhausen, et al.* v. *Baetjer, et al.*, docketed as No. 1091, October Term, 1944, involving a controversy between these petitioners and a bondholders' committee known as the Underlying Bondholders' Committee. Certiorari was also denied in that case on April 23, 1945 (65 Sup. Ct. Rep. 1029).

Since the decision of the Fifth Circuit Court of Appeals the property of Seaboard has been sold to the Reorganization Committee under the Reorganization Plan pursuant to a Final Decree of Foreclosure and Sale dated April 12, 1945, entered by the Virginia Court and the Florida Court. The time to appeal from that decree has expired and no appeals have been taken. The sale of the property to the Reorganization Committee was confirmed by order of the Virginia Court and the Florida Court dated June 29, 1945, and it is anticipated that the reorganization of Seaboard (after almost fifteen years in the Courts) can be completed within the next six months.

In view of the basis on which the Fifth Circuit Court of Appeals decided this case it seems unnecessary to burden this Court with any detailed statement of facts relating to the method of distribution of securities under the Reorganization Plan. A summary statement of such facts is contained in the brief filed on behalf of certain of these re-

spondents and others, dated December 26, 1944, in Case No. 720.

Although, as pointed out above, the Fifth Circuit Court of Appeals did not consider or pass on any of the questions which the petitioners seek to raise, we shall point out briefly below, under Points II and III, that none of those questions presents any issue which would be a basis for certiorari, even if they had been passed on by the Court below.

ARGUMENT

POINT I

No question is raised by the decision of the Circuit Court of Appeals for the Fifth Circuit except the proper application of the rule of comity. That question is not presented to this Court by the petition.

The Circuit Court of Appeals for the Fifth Circuit found it unnecessary to pass on any of the questions presented to it as to the merits of the Seaboard Plan. It agreed with the argument made by the appellees that the doctrine of comity required it to follow the decision of the Circuit Court of Appeals for the Fourth Circuit in a proceeding between the same parties and involving the identical questions unless it were shown that there was "oversight or clear disregard of the rights of local creditors in the property subject to the ancillary receivership." The Court found no such oversight or disregard.

The decision of the Fifth Circuit Court of Appeals was clearly correct. *Beard* v. *Bennett*, 114 Fed. (2d) 578 (U. S. C. A., D. C., 1940); *Louisville & Nashville R. Co.* v. *Western Union Tel. Co.*, 233 Fed. 82 (C. C. A., 5, 1916),

aff'd 250 U. S. 363 (1919); *Stanolind Oil & Gas Co.* v. *National Labor Relations Board,* 116 Fed. (2d) 274 (C. C. A., 5, 1940); *Cottman Co.* v. *Dailey,* 94 Fed. (2d), 85 (C. C. A., 4, 1938).

The petition herein does not raise the question whether the Fifth Circuit Court of Appeals correctly applied the rules of comity and, since no other question was involved in the decision of that Court, there is no basis for certiorari.

POINT II

The provisions of the Seaboard Reorganization Plan relating to the disposition of surplus cash and securities resulting from war earnings are entirely consistent with the principles applied by the courts in the New Haven and Denver reorganizations.

Petitioners lay great stress on their claim that the decisions of the Virginia and Florida Courts approving the Seaboard Plan are inconsistent with the decisions of Courts in other Circuits in the *New Haven* and *Denver* reorganizations, referring to *In re New York, New Haven & Hartford R. Co.,* 147 Fed. (2d) 40, (C. C. A. 2, 1945); *In re New York, New Haven & Hartford R. Co.,* 54 Fed. Supp. 595 (D. C. Conn., 1943) and *In re Denver & Rio Grande Western Railroad Company* v. *Insurance Group Committee* (C. C. H. Bankruptcy Service, p. 57542; (C. C. A. 10, 1945); Petition for certiorari pending).

It is clear that there is no conflict between the decisions referred to above and the provisions of the Seaboard Plan relating to the distribution of surplus cash and securities resulting from war earnings.

The *Denver* case decided that a plan was not fair which substantially excluded junior creditors and gave to senior creditors not only new securities equal to the full amount of their claims but also the benefit of substantial accruals of war earnings not needed for the operation of the property. *The Court in the Denver case did not consider or decide the basis on which the surplus earnings should be divided among the several classes of creditors.*

The Seaboard Plan makes provision for the distribution of surplus cash resulting from war earnings. Prior to the approval of the Plan a substantial amount of such cash had been applied to the retirement of outstanding securities. Petitioners admit that all the securities released for reallocation by that application of cash were redistributed among outstanding claimants, which was entirely in accordance with the *Denver* case. As to war earnings prior to the approval of the Plan, their only complaint is as to the method of distribution, on which the Court did not pass in the *Denver* case.

The petitioners contend that no adequate provision is made for distribution of excess earnings accruing subsequent to the approval of the Seaboard Plan. That argument has no basis in fact. Section VI of the Seaboard Plan (R. Vol. I, pages 45 to 47) expressly provides that cash available for distribution may be distributed among the creditors of the various classes, including the Georgia & Alabama Bonds owned by these petitioners, in the percentages specified in Section VI. The petitioners do not question the fairness to them of those percentages. The Reorganization Committee has announced its intention to distribute any excess cash in accordance with Section VI.

The District Court in the *New Haven* case disapproved the reorganization plan approved by the Interstate Commerce Commission because excess securities which became available because of the use of war earnings to reduce claims were distributed among certain classes of creditors in proportion to the *amounts* of their claims rather than in proportion to the *value of the security* for their claims. Petitioners state that that decision was "specifically approved" by the Circuit Court of Appeals for the Second Circuit. In fact, the question was not mentioned in the opinion of the Circuit Court of Appeals. That, however, is unimportant, because petitioners do not point out any respect in which the Seaboard Reorganization Plan violates the rule laid down by the District Court in the *New Haven* case. In fact it does not violate that rule. The so-called Secondary and Tertiary Allocations referred to by the petitioners (which represented the distribution of excess securities created because of use of war earnings to reduce outstanding claims) were not based on the *amounts* of the various claims but were based (as petitioners themselves admit) on the determinations of the Special Master and of the Virginia and Florida Courts as to the *value of the security* for the various classes of claims. There is, therefore, no conflict with the decisions in the *New Haven* case.

POINT III

The Seaboard Reorganization Plan was approved by the District Courts in the exercise of their independent judgment.

Petitioners allege that the issues before the District Courts in this case were decided on a "compromise basis"

because the Courts accepted certain recommendations of a so-called "Compromise" or "Conference" Committee as to modifications of the Plan recommended by the Special Master. It is also alleged that for that reason the decision of the Circuit Court of Appeals for the Fifth Circuit affirming the Florida Decree is inconsistent with the decision of the Circuit Court of Appeals for the Second Circuit in the *New Haven* case (147 Fed. (2d) 40), because in that case the Circuit Court of Appeals for the Second Circuit sent the reorganization plan back to the Interstate Commerce Commission for additional findings as to the value of the Old Colony property, which Section 77 required the Commission to make, since the Circuit Court of Appeals was not satisfied from the state of the record that the Commission had exercised its own independent judgment, as it is required to do. The Circuit Court of Appeals was careful to point out, however, that, of course, it was possible that in exercising its independent judgment, the Commission might well reach the same valuation.

That same attack on the use of the Conference Committee was made by these petitioners in their petition to this Court in Case No. 720 and the facts are fully set out in the brief of respondents in Case No. 720 at pages 12 to 17, inclusive. It seems clearly unnecessary to discuss it further in this brief. This Court was satisfied when it considered Case No. 720 that the procedure adopted by the District Courts and approved by the Circuit Court of Appeals for the Fourth Circuit with relation to the Conference Committee did not involve any question justifying the issuance of a writ of certiorari. There has been no change in the problem presented, and there is no basis for the allegation that the Virginia Court and the Florida Court did not exer-

cise their independent judgment. They heard testimony and argument for many days and the opinion of the Virginia Court (R. Vol. I, pp. 81-145) shows how carefully all questions raised were considered and analyzed.

The *New Haven* case is not in point. The question there considered was whether the Interstate Commerce Commission had performed the duty imposed on it by statute.

Moreover, as pointed out above, the question is not before this Court in this case, since it was not decided or considered by the Circuit Court of Appeals for the Fifth Circuit.

CONCLUSION

There is no ground for granting the petition.

Paragraph 5 of Supreme Court Rule 38 states that a review on a writ of certiorari will be granted only when there are special and important reasons therefor. There are no such reasons in this case. This Court so decided when it denied certiorari in Case No. 720, in which petitioners raised, in substance, all of the questions which they now seek to raise again.

Moreover, writs of certiorari are granted only to review questions decided by the Circuit Court of Appeals to which the writ is directed. In this case the Circuit Court of Appeals for the Fifth Circuit did not pass on or decide any of the questions which petitioners seek to have reviewed by this Court. Even if certiorari were granted, this Court could only consider the single question raised by the opinion of the Circuit Court of Appeals for the Fifth Circuit,

i.e., whether the doctrine of comity required or permitted that Court, in the circumstances of this case, to follow the decision of the Circuit Court of Appeals for the Fourth Circuit. That question forms no basis for the issuance of a writ of certiorari and has not even been raised by the petitioners.

Dated August 20, 1945.

Respectfully submitted,

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